Jasni bin Yeop (administrator of the estate of Yeop bin Darus, deceased) & Ors v Sand Stone Soil Sdn Bhd and another appeal

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(NCVC)(W)-2062–11 OF 2022 AND P-02(NCVC)(W)-2063–11 OF 2022

B

NANTHA BALAN, AZMI ARIFFIN JJCA AND AHMAD KAMAL HCJ

11 NOVEMBER 2024

C

Legal Profession — Solicitors — Duty of care — Solicitor acted for client in land transaction — Whether the solicitor for the purchaser had acted in breach of her fiduciary duties and in conflict of interests and had failed to protect the interests of the plaintiff as purchaser — Whether the partner was vicariously, jointly and severally liable for any wrongdoing — Partnership Act 1961 s 12

D

These two related appeals concerning dispute of lands purchased by the plaintiff company from the first, second and two defendants in the High Court. Appeal 2062 was an appeal filed by the first to fourth appellants/defendants against the decision of the Penang High Court (after a full trial) delivered on 30 September 2022 which found the first to third appellants jointly and severally liable together with the fourth appellant to the respondent/plaintiff in respect of two sale and purchase agreements, prepared by the fourth appellant as the solicitor and entered into by the first to third appellants as vendors and the respondent as purchaser to purchase two lots of land (known as Lots 429 and 430). The court also held the fourth appellant liable for breach of fiduciary duty towards the respondent (who was the firm's client in a conveyancing transaction) as the respondent's solicitor during the transaction of sale and purchase of the two lands. The court also ordered that the first to fourth appellant to return the deposit of RM119, 944.74 to the respondent. On another appeal which was heard together — Appeal 2063 was an appeal filed by the appellant/plaintiff against part of the decision of the Penang High Court (after a full trial) delivered on 30 September 2022 which found the ninth defendant/respondent, the other partner in the same firm with fourth appellant in Appeal 2062 was not vicariously liable, jointly and severally liable despite having found the fourth respondent in Appeal 2062 liable to the appellant/plaintiff. The fourth respondent in Appeal 2062 was ordered to pay damages of RM976,062.39 damages, a cost of RM50,000. The issues raised were: (a) whether the solicitor for the purchaser had acted in breach of her fiduciary duties and in conflict of interests and had failed to protect the interests of the plaintiff as purchaser; (b) whether the ninth defendant/respondent in Appeal 2063 was vicariously, jointly and severally liable for any wrongdoing.

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Held:

(1) The claim was for damages for breach of fiduciary duty which liability was based on the appreciated value of the land. The difference between the purchase price as per the SPAs and the purchase price as per SPA between the vendor and the fifth defendant to eighth defendant had shown the difference of RM976,062.39. For the fourth defendant's breach of fiduciary duty, the subject land would have been sold to the plaintiff and they would have been able to enjoy the appreciation in the land value. In the circumstances, the court did not agree that it was necessary for the plaintiff to have called a valuer. As such, there was no misdirection or error on the part of the learned trial judge in allowing RM976,062.39 which represented the difference between the two SPA's. In the upshot, the fourth defendant's appeal was devoid of merit and the Appeal 2062 was dismissed (see paras 26 & 29–30).

(2) There was a misdirection by the High Court warranting an appellate intervention. The fourth defendant's conduct as a whole demonstrated that she did what she did in the ordinary course of business of the firm, albeit unlawfully. Hence, although the ninth defendant was innocent or unaware of fourth defendant's misconduct, regrettably the ninth defendant was vicariously liable for fourth defendant's misconduct. What was done by the fourth defendant was within the ambit of s 12 of the Partnership Act. The ninth defendant must be held to be vicariously, jointly and severally liable with the fourth defendant towards the plaintiff. Hence the Appeal 2063 was allowed and the High Court order was set aside. Judgment was entered against the ninth defendant for RM976,062.39 and costs of RM20,000 (subject to allocator) as costs here and below (see paras 39–41).

[Bahasa Malaysia summary

Kedua-dua rayuan berkaitan ini behubung dengan pertikaian tanah yang dibeli oleh syarikat plaintif daripada defendan pertama, kedua dan dua defendan di Mahkamah Tinggi. Rayuan 2062 adalah rayuan yang difailkan oleh perayu/defendan pertama hingga keempat terhadap keputusan Mahkamah Tinggi Pulau Pinang (selepas perbicaraan penuh) yang dibuat pada 30 September 2022 yang mendapati perayu pertama hingga ketiga bertanggungjawab secara bersama dan berasingan dengan perayu keempat kepada responden/plaintif berkenaan dengan dua perjanjian jual beli, yang disediakan oleh perayu keempat sebagai peguamcara dan dimasuki oleh yang perayu pertama hingga ketiga sebagai vendor dan responden sebagai pembeli untuk membeli dua lot tanah (dikenali sebagai Lot 429 dan 430). Mahkamah juga memutuskan perayu keempat bertanggungjawab atas pelanggaran kewajipan fidusiari terhadap responden (yang merupakan anakguam firma dalam urus niaga conveyancing) sebagai peguamcara responden semasa transaksi jual beli kedua-dua tanah itu. Mahkamah juga memerintahkan

perayu pertama hingga keempat mengembalikan wang deposit sebanyak RM119, 944.74 kepada responden. Mengenai rayuan lain yang didengar bersama — Rayuan 2063 adalah rayuan yang difailkan oleh perayu/plaintif terhadap sebahagian daripada keputusan Mahkamah Tinggi Pulau Pinang (selepas perbicaraan penuh) yang dibuat pada 30 September 2022 yang mendapati defendan/responden kesembilan, rakan kongsi lain dalam firma yang sama dengan perayu keempat dalam Rayuan 2062 tidak bertanggungjawab secara vikarius, secara bersama dan berasingan walaupun telah mendapati responden keempat dalam Rayuan 2062 bertanggungjawab kepada perayu/plaintif. Responden keempat dalam Rayuan 2062 diperintahkan membayar ganti rugi sebanyak RM976,062.39, kos sebanyak RM50,000. Isu yang dibangkitkan adalah: (a) sama ada peguamcara bagi pembeli telah bertindak melanggar kewajipan fidusiarinya dan konflik kepentingan dan telah gagal melindungi kepentingan plaintif sebagai pembeli; (b) sama ada defendan/responden kesembilan dalam Rayuan 2063 bertanggungjawab secara vikarius, bersama dan berasingan bagi sebarang salah laku.

Diputuskan:

(1) Tuntutan adalah untuk ganti rugi bagi pelanggaran kewajipan fidusiari yang liabiliti adalah berdasarkan peningkatan nilai tanah. Perbezaan antara harga belian mengikut SPA dan harga belian mengikut SPA antara vendor dan defendan kelima hingga defendan kelapan telah menunjukkan perbezaan sebanyak RM976,062.39. Bagi pelanggaran kewajipan fidusiari defendan keempat, tanah subjek akan dijual kepada plaintif dan mereka akan dapat menikmati peningkatan nilai tanah. Dalam keadaan itu, mahkamah tidak bersetuju bahawa adalah perlu bagi plaintif untuk memanggil penilai. Oleh itu, tiada salah arah atau kesilapan di pihak hakim perbicaraan yang bijaksana dalam membenarkan RM976,062.39 yang mewakili perbezaan antara kedua-dua SPA. Kesimpulannya, rayuan defendan keempat adalah tanpa merit dan Rayuan 2062 telah ditolak (lihat perenggan 26 & 29–30).

(2) Terdapat salah arah oleh Mahkamah Tinggi yang membenarkan campur tangan rayuan. Tingkah laku defendan keempat secara keseluruhannya menunjukkan bahawa dia melakukan apa yang dia lakukan dalam perjalanan biasa perniagaan firma itu, walaupun menyalahi undang-undang. Oleh itu, walaupun defendan kesembilan tidak bersalah atau tidak menyedari salah laku defendan keempat, malangnya defendan kesembilan bertanggungjawab secara vikarius bagi salah laku defendan keempat. Apa yang dilakukan oleh defendan keempat adalah dalam lingkungan s 12 Akta Perkongsian. Defendan kesembilan mesti dipertanggungjawabkan secara vikarius, bersama dan berasingan dengan defendan keempat terhadap plaintif. Oleh itu Rayuan 2063

telah dibenarkan dan perintah Mahkamah Tinggi telah diketepikan. Penghakiman dibuat terhadap defendan kesembilan sebanyak RM976,062.39 dan kos RM20,000 (tertakluk kepada alokatur) sebagai kos di sini dan di bawah (lihat perenggan 39–41).]

Cases referred to

Ahmad Faizal bin Ahmad Zamzami v Telekom Malaysia Bhd and another appeal [2024] MLJU 2296, CA (folld)
Canson Enterprise Ltd v Boughton & Co [1991] 3 SCR 534, SC (refd)
CIMB Bank Bhd v Lee Kim Kee & Ors and another appeal [2018] 3 MLJ 72; [2018] 9 CLJ 168, CA (refd)
Dusik v Newton [1985] 62 BCLR 1 (refd)
Gluckstein v Barnes [1900] AC 240, HL (refd)
GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir [2022] 6 MLJ 369; [2022] 10 CLJ 669, FC (refd)
IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor [2022] 1 MLJ 860; [2021] CLJU 2348; [2021] 1 LNS 2348, CA (folld)
Target Holdings Ltd v Redferns (A firm and Another) [1996] AC 421, HL (folld)
Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal [2020] MLJU 1476; [2020] 6 MLRA, CA (refd)

Legislation referred to

Partnership Act 2012 s 12

Appeal from: Civil Suit No 22NCVC-22–02 of 2014 (High Court, Penang)

Mashitah bt Jamaluddin (with Muhammad Shukri) (Rosli Ismail & Co) in Civil Appeal No P-02(NCVC)(W)-2062–11 of 2022 for the appellants.
K Selvarajan (with S Parameswaran and Muhammad Huzaifah bin Shamsul Bahrain) (K Selva & Assoc) in Civil Appeal No P-02(NCVC)(W)-2063–11 of 2022 for the appellant.
Mureli Navaratnam (with Felix Lim Xin Feng and Lai Chian Loong) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] Appeal 2062 — encl 133 dated 28 October 2022 is an appeal filed by the first to fourth/appellants/defendants against the decision of the Penang High Court (after a full trial) delivered on 30 September 2022 which found the first to third appellants jointly and severally liable together with the fourth appellant to the respondent/ plaintiff in respect of two sale and purchase agreements, prepared by the fourth appellant as the solicitor and entered into by the first to third appellants as vendors and the respondent as purchaser to

purchase two lots of land (known as Lots 429 and 430). The court also held the fourth appellant liable for breach of fiduciary duty towards the respondent (who was the firm's client in a conveyancing transaction) as the respondent's solicitor for the sale and purchase of the two lands. The court also ordered that the first-fourth appellant to return the deposit of RM119,944.74 to the respondent.

[2] Appeal 2063 — encl 134 dated 28 October 2022 is an appeal filed by the appellant/plaintiff against part of the decision of the Penang High Court (after a full trial) delivered on 30 September 2022 which found the ninth respondent is not vicariously liable, jointly and severally liable with the fourth defendant (in the High Court) despite having found the fourth defendant (Roshidah bt Osman) liable to the appellant/plaintiff. The fourth defendant was ordered to pay damages of RM976,062.39 damages, a cost of RM50,000.

[3] These two appeals are related. Hence, to facilitate the determination of these appeals, we find it more convenient to decide these two appeals in a single judgment as they are interrelated.

[4] For ease of reference, parties will be referred to as they were in the High Court.

BRIEF BACKGROUNDS FACTS

[5] The plaintiff, a company, had, on or about the month of June 2012, appointed the firm of Messrs Roshidah & Faziah ('the firm') to act for them in a sale and purchase agreement to purchase two plots of land ('Lots 429 and 430') from the first to third defendants in their capacity as administrators of the estate of three deceased persons, namely:

(i) the first defendant, Yeop bin Darus as the administrator of the estate of Hussain Nachain bt Kader Peechay;

(ii) the second defendant, Ja'afar bin Mat as the administrator of the estate of Shawtamah Bee bt Kader Peechay; and

(iii) the third defendant, Shafie bin Mat as the administrator of the estate of Mariam Bee bt Kader Peechay.

[6] The fourth defendant was the Solicitor who prepared the two sale and purchase Agreements to purchase Lots 429 and 430. It is to be noted that apart from acting for the plaintiff as the Purchaser, the fourth defendant also acted for the first to third defendants as the vendors in both the said S&P transactions.

[7] The plaintiff agreed to purchase the said Properties for a sum of RM588,060.00 for Lot 429 and RM 611,387.40 for Lots 430 respectively. Both parties entered into two (2) Sale and Purchase Agreement on 16 October 2012 ('the SPAs') prepared by the Fourth defendant as solicitors for the First to Third defendants. The plaintiff paid the 10% deposits for the respective purchase for a sum of RM 58,806.00 and RM 61,138.74 respectively.

[8] The plaintiff had only paid the first 10% as deposit for both Lots amounting to RM119,994.74. The second tranche of 10% was yet to be paid as the plaintiff was waiting for the vendors (first to third defendants) to comply with the condition stipulated in the SPAs before the payment of the second tranche of 10% of the purchase price becomes due.

[9] However, both Lot 429 and Lot 430 had been sold off to other parties.

[10] The plaintiff then commenced Civil Suit No: 22NCVC-22-02/2014 against the following groups of persons:

(a) the vendors;

(b) the plaintiff named the three vendors as the first, second and third defendants, claiming for specific performance of the SPAs dated and alternatively, for damages in lieu of specific performance if specific performance was not possible;

(c) the solicitors;

(d) the plaintiff named its solicitor, Roshidah bt Osman as the fourth defendant, for failing to act in the best interests of the plaintiff, for failing to protect the plaintiff's interests as well as for acting in conflict of interest and in breach of the fiduciary duty owed to the plaintiff;

(e) the new purchasers;

(f) the new purchasers who eventually became the registered owners of Lots 429 and 430 were named as to eighth defendants, whereby the plaintiff sought to set aside the vesting orders which made them the registered owners.

(g) The ninth defendant as a partner at M/S Roshidah & Faziah.

[11] After filing Suit 22NCVC-22-02/2014, there were three other civil suits filed by a group of persons claiming to be the beneficiaries of the lawful owners of nine lots of lands, which includes Lots 429 and 430 which were the subject matter of the plaintiff's suits. These suits were

(a) PA-22NCVC-23–02 of 2016 (Suit 23);

(b) PA-22NCVC-24–02 of 2016 (Suit 24); and

(c) PA-22NCVC-153–09 of 2018 (Suit 153).

[12] The three other civil suits were consolidated and ordered to be heard together with Suit 22NCVC-22–02 of 2014.

[13] After a full trial, the High Court, in the other three suits, found that the vesting orders (applied for by the fourth defendant for the first to third defendants) vesting nine lots of lands, including Lot 429 and 430 in their names of the first to third defendants were null and void as they were obtained using forged and/or false documents. The court found that the plaintiff was not in breach of the SPAs.

[14] The High Court also found that the fourth defendant, who acted as the solicitor for the plaintiff in the transaction to purchase Lots 429 and 430, had acted in conflict of interest and thereby committed breach of her fiduciary duty owed to the plaintiff.

[15] The court futher found that the fraud committed by the first to third defendants in obtaining the vesting orders could not have been achieved without the collusion of the fourth defendant.

[16] Dissatisfied, the first to fourth/defendants filed a notice of appeal against the said decision (Appeal 2062).

[17] Aggrieved, the plaintiff also filed a notice of appeal against the said decision for the High Court's finding that the ninth defendant was not vicariously, jointly and severally liable with the fourth defendant.

HIGH COURT'S DECISION

[18] The learned High Court judge in his grounds of judgment, which we reproduce, inter alia, held as follows:

> [43] Sebagaimana yang dinyatakan Yeop dan Sing Kheng Seng, Lim Hon Howa dan Ng Siew Lin telah menandatangani Perjanjian Jual Beli bagi Lot 429 pada 22 Oktober 2013. PP-4 meletakhak Lot 429 ke atas Sing Kheng Seng, Lim Hon Howa dan Ng Siew Lin. Yeop dan Lean Chuan Trading & Transport telah menandatangani Perjanjian Jual Beli bagi Lot 430 pada 9 Oktober 2013. PP-5 meletakhak Lot 430 ke atas Lean Chuan Trading & Transport.
>
> [44] Pindahmilik-pindahmilik ini mulanya cuba dilakukan melalui Borang 14A tetapi ditolak sebab terdapat kaveat persendirian dimasukkan oleh Sand Stone. Oleh itu Yeop menggunakan PP-4 dan PP-5. Saya telah mendapati PP-1, PP-2 dan PP-3 tidak sah dan patut dibatal dan diketepikan oleh itu Yeop tidak sah sebagai pemilik. Berdasarkan keterangan yang dibincangkan di atas saya juga mendapati PP-4 dan PP-5 juga tidak sah dan patut dibatal dan diketepikan. Jelas bagi saya

instrumen yang digunakan untuk pendaftaran adalah terbatal (*void*) di bawah s 340(2)(b) Kanun Tanah Negara 1965 ('KTN'). Oleh itu Yeop sebagai pemilik tidak sah tidak boleh memindah milik sesuatu yang bukan miliknya kepada pihak lain.

[45] Saya memutuskan hakmilik-hakmilik Sing Kheng Seng, Lim Hon Howa dan Ng Siew Lin serta Lean Chuan Trading & Transport masing-masing atas Lot 429 dan Lot 430 boleh disangkalkan menurut s 340(3) KTN 1965. Mereka merupakan pembeli pertama dan Yeop, Ja'afar dan Shafie jelas telah melakukan fraud dalam PP-1, PP-2 dan PP-3. Yeop melakukan fraud dalam PP-4 dan PP-5. Peguam yang mewakili Sing Kheng Seng, Lim Hon Howa dan Ng Siew Lin serta Lean Chuan Trading & Transport iaitu SD4 mengakui bahawa dia sedar terdapatnya kaveat Pendaftar dan minta Roshidah menguruskan pembatalan kaveat tersebut. Surat-surat juga dihantar kepada Sing Kheng Seng dan Lean Chuan Trading & Transport memaklumkan berkenaan kaveat Pendaftar. SD4 gagal membuat carian yang sepatutnya sebelum pihak-pihak menandatangani perjanjian-perjanjian dengan Yeop. Jelas elemen suci hati tidak terdapat dalam transaksi-transaksi ini. Mereka juga telah dimaklumi akan pertikaian antara Yeop dan plaintif-plaintif melalui surat yang dihantar oleh Tetuan Hazmi & Company yang mewakili plaintif-plaintif. Penafian mereka tidak boleh diterima.

[46] Jelas bagi saya Mahkamah-Mahkamah Tinggi dalam membenarkan permohonan-permohonan bagi kelima-lima perintah perletakhakan ini dicemari dengan keterangan palsu. Oleh yang demikian berdasarkan kes *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad* [1998] 1 MLJ 393; [1998] 2 CLJ 75 saya memutuskan kelima-lima Perintah Perletakhakan adalah cacat oleh itu terbatal dan diketepikan.

[47] Sehubungan dengan dapatan saya mengenai Perintah-Perintah Perletakhakan maka bagi GS-22, Yeop, Ja'afar dan Shafie tidak mempunyai hak untuk menjual Lot 429 dan Lot 430 kepada Sand Stone apabila mereka menandatangani perjanjian-perjanjian berkenaan pada 16 Oktober 2012. Oleh yang demikian mereka telah memungkiri perjanjian-perjanjian tersebut kerana tiada pindahmilik dapat dilakukan kepada Sand Stone.

[48] Isu seterusnya bagi GS-22 ialah tuntutan Sand Stone terhadap Roshidah dan Faizah. Berdasarkan keterangan saya mendapati Roshidah bertindak bagi pihak Sand Stone bagi Perjanjian-Perjanjian tersebut. Eksibit P85 dan P86 perenggan 10 Jadual Pertama jelas menunjukkan Tetuan Roshidah & Faizah sebagai peguam Sand Stone. Keterangan jelas menunjukkan:

(a) perintah-perintah perletakhakan dikendalikan oleh Tetuan Roshidah & Faizah;

(b) Tandatangan dalam Suratan Hibah juga disaksikan oleh Tetuan Roshidah & Faizah;

(c) Surat Kuasa Mentadbir Petisyen No 32-365-2011 oleh Mohamad Azwan yang kemudian dipalsukan dengan meletak nama Yeop. Mohamad Azwan juga diwakili oleh Tetuan Roshidah & Faizah;

(d) Borang E bagi pembahagian pusaka Razali bin Mohd Isa dipalsukan menjadi Borang F dan diletakkan nama Ja'afar dan Shafie. Pemohon Nour Eyouni juga adalah anak guam mereka.

[49] Persoalannya bagaimana Yeop, Ja'afar dan Shafie mendapat akses kepada dokumen-dokumen kepunyaan anak-anak guam Tetuan Roshidah & Faizah dan memals serta menggunakan dokumen-dokumen berkenaan sebagai dokumen sokongan jika tanpa penglibatan Roshidah yang mengendalikan firma Tetuan Roshidah & Faizah di cawangan Seberang Jaya.

[50] Percubaan Roshidah membawa masuk ID104 dan ID105 tidak boleh diterima sebab ketiadaan salinan asal. Tidak boleh diterima akal Roshidah tidak dapat kemukakan salinan asal kerana dia merupakan peguam yang menyediakan perjanjian-perjanjian tersebut dan Yeop, Ja'afar dan Shafie merupakan anak guamnya. Saya berpendapat ID104 dan ID105 adalah palsu sebab tandatangan-tandatangan dan cap jari di kedua-dua dokumen tersebut tidak ada perbezaan langsung. Saya menerima keterangan Loh bahawa dia tidak menandatangan kedua-dua ID104 dan ID105. Ekshibit P87 iaitu resit bagi bayaran deposit 10% oleh Sand Stone menunjukkan No Rujukan R/SPA/SSSB/1044/2012. Saya setuju dengan hujah peguam bagi pihak Sand Stone bahawa satu inferensi yang munasabah boleh dibuat bahawa singkatan SSSB itu merujuk kepada Sand Stone Soil Sdn Bhd dan wujudnya fail bagi Sand Stone sebagai anak guamnya.

[51] Roshidah juga mewakili Yeop dalam perjanjian-perjanjian jual beli dengan Sing Kheng Seng, Lim Hon Howa dan Ng Siew Lin dan dengan Lean Chuan Trading & Transport. Roshidah gagal mengemukakan apa-apa surat memaklumkan berkenaan PP-1 dan PP-2 sudah diperolehi pada 9.1.2013 dan meminta bayaran deposit kedua daripada Sand Stone. Sekurang-kurangnya Sand Stone perlu dimaklumkan mengenai PP-1 dan PP-2 dan permintaan untuk bayaran deposit kedua. Sebagai peguam, Roshidah mempunyai tugas untuk melakukan perkara-perkara ini untuk menjaga kepentingan Sand Stone.

[52] ...

[53] Saya berpuas hati bahawa Roshidah gagal dalam melaksanakan tugas fidusiarinya terhadap Sand Stone. Dia gagal melindungi dan menjaga kepentingan Sand Stone sebagai anak guamnya.

[54] Tidak dinafikan Akta Perkongsian Saya mendapati Faizah tidak bertanggungan kerana walaupun mereka merupakan rakan kongsi dan sifat perkongsian menurut s 7 Akta Perkongsian 1961 menetapkan rakan kongsi akan bertanggungan ke atas tindakan rakan kongsinya melainkan jika rakan kongsinya itu tidak mempunyai kuasa untuk melakukan perkara tertentu. Seksyen 12 Akta Perkongsian 1961 yang sama pula memperuntukkan firma juga turut bertanggungan akibat perbuatan salah rakan kongsi.

[55] Berbalik kepada fakta dan keterangan yang dikemukakan terhadap Roshidah dan Faizah, apa yang dilakukan oleh Roshidah melibatkan perbuatan fraud dan pemalsuan dokumen-dokumen yang dikemukakan untuk afidavit sokongan yang diikrarkan oleh Yeop. Dokumen-dokumen tersebut berada dalam simpanan firmanya berkenaan anak-anak guamnya yang lain tetapi dipalsukan dengan

meletak nama Yeop, Ja'afar dan Shafie. Saya tidak fikir ketiga-tiga mereka ini boleh melakukan sendiri tanpa penglibatan Roshidah. Bagi saya apa yang dilakukan oleh Roshidah adalah sesuatu diluar perjalanan biasa urusan firma tersebut sepertimana perbuatan Leong Sing Cheong dalam kes *Lee Kim Kee*. Kes *Toh Fong Cheng & Ors v Pang Choon Kiat & Ors And Another Appeal* [2020] 6 MLRA 512 boleh dibezakan kerana kes itu diputuskan berdasarkan s 13 Akta Perkongsian 1961. Oleh yang demikian saya berpendapat Faizah tidak bertanggungan atas perbuatan Roshidah.

[56] ... Bagi GS-22 saya membenarkan tuntutan plaintif dengan kos melainkan tuntutan terhadap Faizah defendan kesembilan di mana plaintif gagal membuktikan tuntutannya atas imbangan kebarangkalian bahawa Faizah turut bertanggungan sebagai rakan kongsi.

MAIN ISSUES FOR DETERMINATION

[19] Before us, although the appeals raised several grounds, for convenience, we think that it would be appropriate if these are combined and addressed together in a single judgment.

(a) whether forged documents were used by the first to the third defendants to enter into the sale and purchase agreements to sell both Lot 429 and 430 to the plaintiff;

(b) whether the fourth defendant as solicitor for the plaintiff (as purchaser) had acted in breach of her fiduciary duties and in conflict of interests and had failed to protect the interests of the plaintiff (as purchaser); and

(c) whether the ninth defendant as a partner at M/S Roshidah & Faziah, is vicariously, jointly and severally liable for any wrongdoing.

OUR DECISION

[20] At the start of the parties submission, the learned counsel for the first to the fourth defendants informed us that the first to the third defendants are withdrawing their appeal in full. Hence, the appeal by the first to the third defendants (Appeal 2062) is struck out.

[21] In respect of the fourth defendant appeal, learned counsel submitted that she is not contesting fourth defendant's liability for breach of fiduciary duty towards the plaintiff. Her sole complaint is only on the issue of quantum of damages where the learned trial judge had awarded a sum of RM976,062.39 to the plaintiff as damages for breach of fiduciary duty without giving any specific basis for the amount awarded. plaintiff also did not adduce evidence of the market value of the land through expert evidence/valuer. The plaintiff just did an arithmetical calculation based on the values in the SPAs which is RM1,199,447.74 for the two lots.

[22] Learned counsel for the fourth defendant also strongly argued that the grounds of judgment does not even mention the sum of RM976,062.39. She further said that only during oral clarification on 30 September 2022, the learned trial judge allowed this amount which was solely derived from the plaintiff's submission. This can be clearly seen from the plaintiff's written submission at pp 112–113 encl 10 Volume C Record of Appeal which we reproduce herein below said:

> 91. Now, the court has the benefit of hindsight that the value of the land has appreciated. This can be seen from the purchase price of Lot 429 & 430 as stated in the Sale and Purchase Agreements dated 16.10.2012 (Exhibit P-85 and P-86) when the plaintiff purchased it, which is RM1, 199,447.74 and the price of RM2, 175,509.79 as stated in the Sale & Purchase Agreements dated 22.10.2013 and 9.10.2013 respectively when the 5th to the 8th defendants purchased it. The appreciation is a sum of RM976,062.39. In law the appreciation of the value of property should be calculated in comparison of the prices between the date the plaintiff entered into agreement to purchase, which is on 16.10.2012 and the current market value of the property, which the plaintiff submits ought certainly to be higher than the price paid for by the 5th to 8th defendants in 2013. However, the plaintiff is willing to restrict the claim for loss of profit to RM976,062.39 as stated above. The plaintiff respectfully submits that on the facts of our present case, the loss of opportunity that was stated by McLachlin J in *Canson* case is reflected by the loss of profit that the plaintiff has suffered in this case in the sum RM976,062.39.
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> 92. Therefore, the plaintiff submits, employing the principles for assessment for compensation when the equitable remedies of restitution and account are not appropriate as expressed by McLachlin J in *Canson*'s case, the plaintiff is entitled to be compensated for the sum of RM976,062.39 as submitted in para 91 above.

[23] On the other hand, learned counsel for the plaintiff argued that as a result of the aforesaid breach of fiduciary duty by the fourth defendant, the plaintiff has suffered loss. SP1, Loh Wei Li testified that as a result of the conduct of the defendants, the plaintiff has suffered loss in the form of loss of profit in the appreciation of the value of the land. This can be seen from the purchase price of Lots 429 and 430 when the plaintiff purchased it which was RM1,199,447.40 and the price of RM 2,175,509.79 when the fifth to the eighth defendants purchased it. In short, the sum of RM976,062.39 is the difference between the purchase price for the SPAs dated and the SPA dated 22 October 2013 for the other purchasers (D5, D6, D7 and D8) in Suit 22.

[24] Hence, learned counsel for the plaintiff submitted that it is not fatal if valuer is not called because the evidence has already been presented in court where the appreciation of the value of property can be calculated in comparison between the date the plaintiff entered into the SPAs to purchase the two lots, which is on 16 October 2012 (exh P-85 and P-86) and the current market value of the property paid by the the fifth to eighth defendants in 2013. Thus,

if the sale to the plaintiff had gone through, plaintiff would have enjoyed this capital appreciations of the property.

[25] Having appraised ourselves of the appeal records, written and oral submissions of parties, the grounds of judgment by the learned trial judge, we now give our decision in respect of fourth defendant appeal on quantum only.

[26] As stated earlier, the fourth defendant has conceded on liability i.e. breach of fiduciary duty. We agree that generally a valuer has to be called to provide expert evidence on the market value of the subject land. However, here we do not think that a valuer is necessary in every situation. It all depends. On the facts here, the claim is for damages for breach of fiduciary duty which liability is based on the appreciated value of the land. The difference between the purchase price as per the SPAs and the purchase price as per SPA between the vendor and the D5–D8 shows the difference of RM976,062.39.

[27] In this regard, we are guided by Lord Browne Wilkinson's judgement of *Target Holdings Ltd v. Redferns (A firm and Another)* [1996] AC 421 (House of Lords) where His Lordship referred to the judgment of McLachlin J in the Canadian Supreme Court case of *Canson Enterprise Ltd v Boughton & Co* [1991] 3 SCR 534 and stated that the rules applicable to equitable compensation stated therein as expressed by McLachlin J is good law. His Lordship held as follows (pp 438–439):

> ... But the judgment of McLachlin J (expressing the minority view) contains an illuminating exposition of the rules applicable to equitable compensation for breach of trust. Although the whole judgment deserves study, I extract the following statements.

At p 163:

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, ie, the plaintiff's lost of opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common-sense view of causation, were caused by the breach.

'In my view, this is good law.

[28] In the case of *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor* [2022] 1 MLJ 860; [2021] CLJU 2348; [2021] 1 LNS 2348, S Nantha Balan JCA delivering the judgment of the court held as follows:

[355] We turn now to the topic of remedies. It is important to identify the starting point in the grant of any remedy. It is this — the equitable claimant is prima facie, entitled to specific restitution of the trust property. If that is not possible, then equitable compensation is payable.

[356] In *Target Holdings v Redfern* [1995] 3 All ER 785; [1996] AC 421; [1996] 1 AC 421; [1995] UKHL 10, Lord Browne-Wilkinson, opined that 'if specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed'.

[357] It need hardly be said that the court has a wide discretion in the matter of remedies. In this regard, it is appropriate to refer to the decision of the Court of Appeal in *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679; [2004] 5 AMR 648 (CA) where it was stated that the court in exercising its equitable jurisdiction can mould the appropriate relief as suits the circumstances of the case. This is what the Court of Appeal said [31]:

> [31] We now address the fourth point. Mr Tan's argument that the learned judge gave the plaintiff something he had not asked for overlooks two fundamental principles. A court of equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts.

So, for example if rescission appears to be the inevitable or indeed the only remedy in a given case, a court of equity may decline to order rescission and instead may order equitable compensation by way of adjustment. The cases of *Gluckstein v Barnes* [1900] AC 240 and *Dusik v Newton* [1985] 62 BCLR 1 amply illustrate the malleability of equitable remedies to fit particular circumstances. We therefore find no merit in Mr Tan's argument.

[29] Based on the principles enunciated in cases such as *Target Holdings Ltd v Redferns*, which deal with compensation for breach of fiduciary duty and the Court of Appeal's decision in *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor*, we take the view that the beneficiary of a breach of trust or as in this case, the beneficiary in a breach of fiduciary duty, should be compensated so that they can be put in the position as if there was no breach of fiduciary duty. Hence, but for fourth defendant's breach of fiduciary duty, the subject land would have been sold to the plaintiff and they would have been able to enjoy the appreciation in the land value.

[30] In the circumstances, on the facts here we do not agree that it was

A necessary for the plaintiff to have called a valuer. As such, we are satisfied that there was no misdirection or error on the part of the learned trial judge in allowing RM976,062.39 which represented the difference between the two SPA's.

B **[31]** In the upshot, we find the fourth defendant's appeal is devoid of merit. Appeal 2062 is dismissed with cost of RM10,000 (subject to allocator fees). No order as to costs for first, second and third appellants.

C **[32]** Moving on to Appeal 2063, the learned trial judge ruled that ninth defendant is not jointly and vicariously liable although she and the fourth defendant were partners at that material time.

[33] The learned counsel for the ninth defendant argued that the
D misconduct acts or omissions of the fourth defendant are not linked to nor related to the ninth defendant, as both the fourth and ninth defendants were operating a different branches at the material time. The fourth defendant and the ninth defendant have been in sole control of their respective branches without the interference of the other.

E

[34] The learned counsel for the ninth dependant further submitted that the learned trial judge was right in making the finding that the fourth defendant's misconduct was not done in the ordinary course of the business of the firm, which is similar to the misconduct stated in the case of *CIMB Bank Bhd v Lee*
F *Kim Kee & Ors and another appeal* [2018] 3 MLJ 72; [2018] 9 CLJ 168 where the Court of Appeal held as follows:

> [48] ... the acts of Mr Leong Sing Cheong did not bind the third party. We were of the view that the commission of the fraudulent acts were by Mr Leong Sing Cheong acting on his own personal interest. In other words, we agreed with the learned High
G Court judge's finding that Mr Leong Sing Cheong had acted on his own frolic and had siphoned out the said compensation sum in his personal capacity and not in the name of the third party.
>
> [49] We were of the view that the act of opening the fixed deposit account by Mr Leong Sing Cheong in the name of the fictitious person and the act of instructing
H the bank/defendant to uplift the fixed deposit account and to have the principal sum and the accrued interest credited into the account of the third party were not done in the ordinary course of the business of the firm.
>
> [50] We refer to s 7 of the Partnership Act and the same is reproduced as follows:
>
> I 7 Power of partner to bind firm
>
> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in

fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

[51] Thus, we were of the view that a partnership does not ipso facto become liable for all of the liabilities of its partner. What Mr Leong Sing Cheong did was definitely not within the scope and boundaries of the partnership of the firm and thus, the third party could not be made liable for that fraudulent transaction.

[35] However, on the other hand, learned counsel for the plaintiff contended that as a partner in the firm of M/S Roshidah & Faziah, the ninth defendant has a duty to supervise her other partners and staff including Legal Assistants in the said firm to ensure that they discharged their professional duties with integrity, probity and trustworthiness as is expected of any solicitor carrying out their duties in the ordinary course of business. It is no answer for the ninth defendant to merely say that the ninth defendant was stationed at a different branch of the firm and therefore had no control over the conduct of the fourth defendant. Such an arrangement, if any, between the fourth and ninth defendants is a private matter between them and does not affect the legal rights of third parties like the plaintiff in this case to claim damages against the ninth defendant for failing to ensure that a partner in the firm does not commit any wrongdoing.

[36] Now, coming to our decision on this critical issue, as a start it is pertinent for us to refer to the Court of Appeal case of *Toh Fong Cheng & Ors v Pang Choon Kiat & Ors and another appeal* [2020] MLJU 1476; [2020] 6 MLRA where Lee Swee Seng JCA delivering the judgment of the court held as follows:

[132] There is no way to conclude other than that the transaction was a normal conveyancing transaction ordinarily handled by a legal firm and in the ordinary course of business of the firm within the meaning of s 12 of the Partnership Act 1961. The fact that the late Madam FL Foo had converted the monies paid to her own personal and private use does not transform the transaction of the Legal Firm in the SPA and its attendant actions into her personal and private transaction where the other partners can disclaim liability.

[133] The abuse by one partner of the trust reposed on her by the plaintiff purchaser in the ordinary course of business of the firm by misapplying the payment made into the firm's client's account does not bring the transaction outside the liability of the firm even though in this case the other partners had no knowledge of and did not participate in the acts of the principal partner in making wrongful payments out to an unauthorised third party.

[134] Otherwise clients or parties who suffer as a result of the negligence of a partner can only sue the partner concerned and not all the partners for breach of contract or the tort of negligence as oftentimes the partner concerned would have absconded.

That is not the position of the law of partnership where breach of contract or tort is concerned.

[135] Section 12 of the Partnership Act 1961 makes the firm 'liable for the wrongful acts or omissions of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners. It reads as follows:

> 12 Liability of firm for wrongs
>
> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

[136] Section 11 of the Partnership Act 1961 makes all the partners of the firm liable jointly or all debts and obligations of the firm incurred while he is a partner as follows:

> 11 Liability of partners
>
> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

[138] Jackson and Powell on *Professional Liability* (8th Ed, Sweet & Maxwell) on 'Solicitors' Liability on Undertakings' explained the liability of partners in a legal firm as follows at pp 832–833:' 11-154 Liability of partners. The knowledge of one partner is generally attributed to the other partners in a firm. Further, a solicitor's partners are vicariously liable for his wrongful acts or omissions when acting in the ordinary course of business of the firm or with the authority of his co-partners, see s 10 of the Partnership Act 1890. In *Dubai Aluminium Co Ltd v Salaam*, the House of Lords held that 'wrongful acts' in s 10 included equitable wrongs such as dishonest assistance in a breach of trust, as well as tortious liability. They also held that such acts would be done in the ordinary course of the business of the firm if it could fairly and properly be so regarded, which was a question of law.

Thus, the drafting of an agreement by a partner to assist in a fraudulent scheme was so closely connected with acts which he was authorised to do that he could be regarded as having acted in the ordinary course of the firm's business, and his innocent partners were liable for his assumed dishonest assistance.

[37] In *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369; [2022] 10 CLJ 669, the Federal Court through the judgment delivered by Harmindar Singh Dhaliwal held as follows:

> [31] In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators:

(a) the intentional wrong must be committed by the employee in the course of employment;

(b) there must be connection between the wrongful act and the nature of the employment;

(c) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and

(d) the risk is created by the employer, owing to the features of the business.

[32] Applying these factors to the instant case, we do not see how the High Court and the majority in the Court of Appeal had erred in applying the close connection test. In our view, there cannot be any blemish on the decisions of the courts below for the following reasons.

[33] At the forefront, the standout factor is the feature of GMP's business. It is a private agency that offers the service of armed bodyguards, among others. GMP is the registered owner of the firearms with the carry and use licence issued by the Home Minister. As such, they are obliged to follow all rules and regulations made under s 18 of the Private Agencies Act 1971. It is therefore GMP which equips or provides firearms to its employees who are designated to the position of personal bodyguards. In the instant case, GMP equipped Jaafar with the Glock automatic.

[34] More significantly, it was GMP who was responsible for selecting and employing Jaafar to function as a personal bodyguard thus enabling him to carry the said firearm. They cannot now be heard to say they are not responsible if he had acted unlawfully in the course of his duty. It was common ground that on that fateful evening, Jaafar was performing his assignment as a bodyguard albeit in an illegal way.

[35] By providing Jaafar with a firearm to perform his duty as personal bodyguard, GMP has created a risk which exposed the public to potential harm. The risk manifested into reality when Jaafar decided to embark on a rampage for reasons only known to him. As reiterated earlier, GMP had created an opportunity for Jaafar to utilise the Glock automatic, albeit for wrongful intent. There is therefore little doubt that the wrongful act committed by Jaafar is closely connected with the line of work assigned to him by GMP, and for which GMP equipped him with the lethal weapon. As stated earlier, Jaafar was on duty that fateful day pursuant to his employment as a personal bodyguard.

[36] Now, Jaafar's actions may have been unauthorised by his employer but the pertinent question to ask is whether Jaafar's actions in unlawfully discharging his firearm and causing injury to Amirul was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. On the facts of this case and for the reasons we have already stated, the answer must be yes. To put it in another way, Jaafar's wrongful act was not independent from the task he was employed to do.

[48] …the act of Jaafar, the tortfeasor, shooting the members of the public and the respondent were a series of actions so closely connected with his employment as a bodyguard who was tasked of guarding Dato' Ong Teik Kwang. His action was done in the course of employment and in executing his duties as a bodyguard. The

evidence of unauthorised shootings being so closely connected to his duties not only was overwhelming but fitted well with House of Lords' landmark case of Lister. Hence, his employer, the GMP Kaisar Security (M) Sdn Bhd, the appellant is vicariously liable for the wrongful act committed against the respondent. It is therefore important to note that the 'close connection' test must always be considered on the factual matrix and circumstances of each case and cannot apply independently without looking at each set of facts.

[38] In *Ahmad Faizal bin Ahmad Zamzami v Telekom Malaysia Bhd and another appeal* [2024] MLJU 2296, the Court of Appeal through the judgment delivered by S Nantha Balan JCA held as follows:

> [33] Hence, the test is not, as argued by counsel for D1 and D2 whether the employee was on a 'frolic of his own'. Here, D3 was D1, D2's employee and was a Maintenance Supervisor and it was within his job scope to sign the Surat Kebenaran and the Goods Issued Notes, except that in this case, he signed and used the official stamp of D1, D2 to facilitate the illicit extraction of copper cables from the plaintiff's store based on the impugned MO's which were all falsified/forged. Hence, following GMP Kaisar S case, the learned Judicial Commissioner should have asked (but did not ask) whether the common denominators for imposing vicarious liability were established, namely:
>
> (a) the intentional wrong must be committed by the Employee in the course of employment;
>
> (b) there must be connection between the wrongful act and the nature of the employment;
>
> (c) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and
>
> (d) the risk is created by the employer, owing to the features of the business.
>
> [40] Having examined the evidence, particularly D3's evidence as to his job scope and his role in this unlawful enterprise undertaken in collaboration with other participants, namely D4 to D6, it is our finding that D3 was engaged in unlawful activity whilst in the course of his employment with D1 and D2, albeit that his employer had not authorised or instructed him to undertake the impugned activity. Indeed, it would seem that they had no knowledge of D3's covert activities. At any rate, in these circumstances, we think that given D3's central or substantive role in this nefarious enterprise and since the actions which he carried out are not alien to his job scope — it is clear that D1 and D2 as his employers must be held liable both in tort and in contract (per cl 43.2 of the contract) as D3 was the 'gatekeeper' and together with D4, were the main facilitators of this criminal enterprise which was carried out in collaboration with other actors eg, D4, D5, and to a lesser extent, D6. In fact, there is nothing in the defence of D1 and D2 to suggest that D3's action was outside the scope of his employment as a maintenance supervisor.

[39] After due consideration, we are satisfied that there was a misdirection by the High Court warranting an appellate intervention. The case *Lee Kim Kee*

does not represent the law on vicarious liability. The law is as stated by the Federal Court in *GMP Kaisar Security (M) Sdn Bhd*, and as applied by the Court of Appeal in *Ahmad Faizal bin Ahmad Zamzami*, and *Toh Fong Cheng & Ors*.

[40] Applying the test at para [33] of *Ahmad Faizal* case, we are satisfied that fourth defendant's conduct as a whole demonstrated that she did what she did in the ordinary course of business of the firm, albeit unlawfully. Hence, although ninth defendant is innocent or unaware of fourth defendant's misconduct, regrettably ninth defendant is vicariously liable for fourth defendant's misconduct. What was done by the fourth defendant comes within the ambit of s 12 of the Partnership Act. The ninth defendant must be held to be vicariously, jointly and severally liable with the fourth defendant towards the plaintiff

[41] Hence the appeal is allowed. The High Court order dated 30 September 2022 vis a vis ninth defendant is set aside. Judgment is entered against the ninth defendant for RM976,062.39 (no interest). Cost of RM20,000(subject to allocator) as costs here and below.

Order accordingly.

Reported by Muhamad Azham Marwan